United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7407

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

NO. 75-7407

LUDDIE FORT AND JAMES BOOKWALTER,
Plaintiffs/Appellants

vs.

ROBERT C. WHITE
d/b/a ROBERT C. WHITE CO., REALTORS,
Defendant/Appellee

APPEAL FROM UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEE

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THE ISSUE PRESENTED FOR REVIEW

Did the district court err in refusing to assess punitive damages and attorney's fees under 42 USC §3612, a) where it was found that acts of discrimination in violation of 42 USC §3604 were committed by employees of defendant without his knowledge and against his instructions, b) where, when brought to his attention, defendant took immediate and continuing steps to prevent reoccurrence of such discriminatory acts, and c) where plaintiffs failed to show financial inability to assume their attorney's fees.

PRELIMINARY STATEMENT

The decision appealed from was rendered by Honorable M. Joseph Blumenfeld, United States District Judge, District of Connecticut.

STATEMENT OF THE CASE

The complaint, dated June 14, 1974, asserts claims under Title VIII of the Civil Rights Act of 1968 (42 USC §3601 et. seq.) and provisions of the Civil Rights Act of 1871 (42 USC §1982). The plaintiff Luddie Fort, a black woman, claims to have been discriminated against in the rental of an apartment unit managed by defendant. The plaintiff James Bookwalter, a resident of the building in which that apartment unit is located, claims loss of the benefits of interracial housing resulting from the claimed discrimination. Suit was brought in the form of a class action on behalf of all those similarly situated to plaintiffs Fort and Bookwalter.

Plaintiffs base jurisdiction upon 28 USC §1343 (3) and (4) and 42 USC

§3612 (a). They sought a declaratory judgment, preliminary and permanent injunctions, actual and punitive damages and attorney's fees.

On June 27, 1974 an evidentiary hearing was held on plaintiff's application for preliminary injunction. The district court found that "plaintiffs faced no irreparable injury by reason of defendant's conduct" and denied the application.

On December 17, 1974, the day scheduled for trial of the issues, the United States brought suit against defendant under 42 USC §3613 and, simultaneously, agreed with defendant to a consent decree which while recognizing defendant did not admit any of the fair housing law violations alleged in the governmen complaint, required of him an affirmative action plan set out in the decree.

The plaintiffs Fort and Bookwalter joined in the consent decree, and dropped their claims for class action certification and injunctive relief. At the beginning of trial, plaintiffs, through their counsel, disclaimed any compensatory damages. Consequently, the trial concerned itself solely with the individual claims of plaintiffs Fort and Bookwalter for punitive damages, costs and attorney's fees. Joint Appendix (hereafter JA) p. 39.

Based upon two days of hearing evidence, the district court found that Mr. Bedard, a building superintendent employed by defendant, had engaged in racially discriminatory rental practices at a building under defendant's management; that Bedard's actions rendered his employer, the defendant, liable for Plaintiffs' actual damages; that having not shown any actual damages, plaintiffs were entitled to nominal damages only, which the court

set at one dollar each (JA p. 52); that while the evidence showed one other on-premises superintendent engaged in similar discriminatory rental practices, there was no evidence that anyone else in defendant's management company knew of the actions of these two superintendents or had similar policies (JA p. 53); that under the circumstances an award of punitive damages against defendant would be unjustified, (JA p. 55); that the question of awarding attorney's fees was within the discretion of the court; and that "where, as here, the defendant's liability is based entirely on unauthorized actions of his employees attributed to him through the doctrine of respondent superior, there is so little culpability as to make an award of attorney's fees unjust." (JA pp. 63-64).

Judgment was accordingly entered on June 20, 1975 (Docket Entry No. 25) from which judgment plaintiffs have appealed.

STATEMENT OF THE FACTS

The facts, as found by the district court, are unchallenged. (Plaintiffs-Appellants' Brief [hereafter Plaintiffs' Brief] p. 8.) The defendant is a local realtor who manages approximately 1500 apartment units in some 50 buildings in the greater Hartford area (JA pp. 11, 38). On April 29, 1974 the plaintiff Fort inquired by telephone of Mr. Bedard, the superintendent of a defendant-managed apartment house at 166 Collins Street, Hartford, as to the availability of one-bedroom units. Bedard indicated such a unit would soon be available and told Ms. Fort that she could see it the following morning. However, the

next day when Ms. Fort went to view the apartment, Mr. Bedard denied having spoken to her by telephone.

Being thus turned away, Ms. Fort decided to organize "tests" of the Collins Street building as well as other defendant-managed rental properties.[1] On the basis of "test" evidence adduced at trial (JA pp. 41-47), as well as additional testimony concerning the operation of defendant's management business (JA pp. 47-50), the court found that Bedard, in violation of 42 USC §3604 (a) and (d), refused on the basis of race to negotiate with the plaintiff Fort and black testers although he was willing to negotiate with white testers (JA p. 51). The court further found that while, in addition to Bedard, one other superintendent, Mr. LaCroix, rented apartments in a racially discriminatory manner, "there is no evidence that anyone else in [defendant's] organization knew that this discrimination was going on" (JA p. 53) or "that anyone else in [defendant's] company

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[1] No evidence was offered by or in support of the claim of plaintiff Bookwalter. Although under Trafficante vs. Metropolitan Life Ins. Co. 409 US 205 (1972), Bookwalter, by alleging injury by deprivation of benefits of interracial associations, states a cause of action cognizable under 42 USC §3610, there is nothing in Trafficante which extends to Bookwalter standing under 42 USC §3612. In addition, while, arguendo, Bookwalter may have alleged a "personal stake in the outcome of the controversy" (Baker vs. Carr 369 US 186, 204 [1961]), he has neither proved nor sought to prove that alleged personal stake. Plaintiffs did not offer one item of evidence to establish, in fact, that Bookwalter has been deprived of benefits as alleged, or even what the nature of such benefits are. Thus, plaintiff Bookwalter failed to demonstrate that he has "a sufficient stake in an otherwise justiciable controversy to obtain resolution of that controversy." Sierra Club vs. Morton 405 US 727, 731 (1971). The identification of a prohibited act is not enough; proof of an immediate, resulting impact is also necessary. Cause is only one-half of a justiciable loaf.

had similar policies."[2] (JA p. 54).

The district court noted the defendant testified "that prior to institution of this suit he had no knowledge or policy of racial discrimination in buildings managed by his company." Plaintiffs chose to not cross examine defendant (JA p. 47). At the hearing on plaintiffs' application for preliminary injunction, defendant had testified "that several months before any of the actions complained

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[2]Mr. Bedard was superintendent of the apartment house referred to in Judge Blumenfeld's memorandum as "Collins Street." Mr. LaCroix was superintendent of the complex referred to as "Garden Street." As to these buildings, the court found that "Before the suit was filed Bedard had shown the apartments at Collins St. and had sometimes taken a deposit (thereby putting a "hold" on the apartment) before referring the prospective tenant to the White office. LaCroix had apparently had an even freer hand at the Myrtle/Garden Sts. complex, which had a very low turnover rate. All of the vacancies were filled from LaCroix's own waiting list, which apparently consisted largely of friends of present tenants who wanted to move in. Lazich's [an office employee of defendant] testimony confirms that LaCroix was effectively the rental agent for this complex; she said that she never recommended this complex to a prospective tenant unless she received a specific inquiry about it.

Third, Cross [a supervising manager employed by defendant] and Lazich gave the following testimony about tenancy at the buildings in question:

The Collins St. complex exhibited low turnover. Although there has been some advertising of it, most of the vacancies are filled by word-of-mouth recommendations at St. Francis Hospital, which is in the vicinity. As of early May 1974 about 5-10% of the 50 units in the complex were occupied by nonwhites. As of May 31, 4 of the 42 tenants at 166 Collins St. were nonwhite (2 black, 1 Spanish-surname, 1 Oriental). None of the 13 tenants at 176 Collins were non-white. As of December 17, 1974, 6 of the 55 tenants in the complex were nonwhite.

At the Garden St. and Myrtle St. buildings, which White has managed since 1969, there has never been more than a 1% vacancy rate. Probably no more than 8 to 10 apartments per year have changed in the whole complex. Those that did change hands did so through LaCroix's waiting list; White never had to advertise these vacancies. As of May 31, 1974, none of the 113 tenants in this complex were nonwhite, and Cross could not remember that there had ever been any nonwhite tenants in these buildings. Lazich testified that there had been some tenant changes in March through mid-June of 1974. In most of these cases the incoming tenant was either a friend of a present tenant or a tenant of another White-managed building. In one case a black woman was planning to move in, but her daughter decided to join her and they went to 176 Collins St. in order to have more room. As of December 17, 1974, 3 of the 113 tenants were nonwhite. (JA p. 49)

of in this case he sent to all his superintendents a letter, which was received into evidence at that time, explaining and mandating compliance with his policy of nondiscrimination. After this suit was begun he sent a strongly worded letter, which was also put into evidence, to each superintendent stating [defendant's] policy of nondiscrimination. With that letter were a copy of the fair housing title of the 1968 Civil Rights Act, 42 USC §§3601-19 (1970), and a poster stating that discrimination in housing is illegal and giving the address of the federal official responsible for enforcement of the fair housing laws. Each superintendent was required to sign a pledge to comply with the fair housing laws and to hang the fair housing poster prominently within his apartment building. [Defendant] testified that he also planned to use his own testers to insure that these directives were being complied with. Cross testified that the superintendents Bedard and LaCroix, both of whom are over 70, were relieved of all responsibility for showing or renting apartments after this suit was filed. This is supported by [defendant's] testimony at the hearing on the application for a preliminary injunction. In September LaCroix was terminated." (JA p. 48).

SUMMARY OF ARGUMENT

In their brief, plaintiffs assert that the district court "erred in denying them adequate compensatory damages, punitive damages and reasonable attorneys fees." (Plaintiffs' Brief p. 7.)

- With regard to compensatory damages, plaintiffs admit not having suffered any actual damages (JA p. 3 footnote 2; Plaintiffs' Brief p. 6).

Plaintiffs now appear to argue that nominal damages are compensatory in nature and that the one dollar per plaintiff awarded by the court was an inadequate nominal/compensatory award.

Defendant contends that nominal damages are just that and no more; that the "compensatory adequacy" of nominal damages is an anomolous concept and not an appropriate ground for appeal.

- With regard to punitive damages, plaintiffs, while accepting the district court's factual determinations (a) that defendant's connection to the discriminatory acts of two of his or-premises superintendents was through application of the theory of respondeat superior only, and (b) that upon learning of such facts defendant immediately took steps to safeguard against reoccurance, insist that the district court erred in not assessing a penalty against defendant, thereby ignoring "the general deterrent effect that an award of punitive damages would have in deterring other members of society from engaging in similar conduct." (Plaintiffs' Brief, p. 19 emphasis added)

Defendant contends that it is the responsibility of the district court to weigh and determine the appropriateness of punitive damages in the context of the factual circumstances presented at trial.

- With regard to attorney's fees, plaintiffs concede, as they must, that Alyeska Pipeline Service Co. vs. Wilderness Society _____ US _____ (1975)[3] forecloses their claim to attorney's fees based upon 42 USC §1982 private attorneys general arguments, and rely solely upon what they assert to be the direction of 42 USC §3612(c) to award attorney's fees.

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[3] 95 S. Ct. 1612, 44 L. Ed 2d 141.

Defendant contends that the district court was correct in concluding that the award of attorney's fees under 42 USC §3612(c) is discretionary and not mandatory.

ARGUMENT

A. Plaintiffs Specifically Disclaimed Compensatory Damages.

At the commencement of trial, plaintiffs' attorney represented in open court that plaintiffs did not seek compensatory damages (JA p. 40). The district court understood this representation to mean that "plaintiffs sought only nominal damages plus punitive damages." (JA p. 40, note 2). The district court further found that "because they have not attempted to show actual damages Fort and Bookwalter are entitled to collect only nominal damages, hereby set as one dollar each." (JA p. 52).

With a sophistry obviously inspired by the limited monetary extent of the damages thus awarded, plaintiffs now argue that in disclaiming "compensatory" damages, they meant only "actual" damages, as opposed to compensation for being subjected to a dignitory tort.[4]

"A damage action under [42 USC §3612] sounds basically in tort - the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendants' wrongful breach." Curtis vs. Loether 415 US 189, 195 (1974)

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[4] see: addendum A, affidavit attached to defendant's Trial Reply Brief, Docket Entry No. 17.

"The purpose of tort damages is to compensate an injured person for a loss suffered and only for that." Harris vs. Standard Acc. & Ins. Co. 297 F 2d 627, 631 (2nd Cir. 1961) In contrast to such compensatory damages, nominal damages are a token signifying plaintiffs' rights have been invaded. Magnett vs. Pelletier 488 F 2d 33, 35 (1st Cir. 1973)

The distinction between compensatory damages and nominal damages is too well established in the law[5] to allow plaintiffs the benefit of their unique definition.

In suggesting, as they do at page 17 of their brief, that the district court was unaware of the "dignitory tort" aspect of a civil rights violation, the plaintiffs ignore footnote 9 of the Memorandum of Decision (JA p. 61) where Judge Blumenfeld notes that "the result here is ... due to the ... theory on which plaintiffs' counsel proceeded. He has not asked for any actual damages beyond the nominal damages awarded and has concentrated solely on obtaining punitive damages. It is hardly clear that actual damages were unavailable, however ... Thus a number of courts have awarded damages for mental anguish and humiliation ... It is entirely possible that such a recovery could have been obtained here as well."

In disclaiming compensatory damages, plaintiffs disclaimed, as well, damages arising from a dignitory tort. In addition, they offered no evidence of the effects on plaintiffs of a dignitory tort, such as mental anguish, humiliation or other subjective reaction. It is apparently plaintiffs' contention that

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[5] see: Chesapeake & Potomac Tel Co. vs. Clay 194 F 2d 888, 890 (D.C. Cir. 1951)

they have no such burden of proof. They would thus replace the elementary rules of evidence with an alimentary rule of innuendo. They should not be permitted to do so.

B. Plaintiffs Were Not Entitled to Punitive Damages Upon the Facts Found By the District Court.

Plaintiffs contend that the district court erred in refusing to assess punitive damages against defendant. They argue that since defendant's employees were found to have engaged in discriminatory acts, perforce, the court should have levied punitive damages so as to deter others from similar acts.

The deterrent-effect rationale of punitive damages was recently discussed by this court in Williams vs. City of New York 508 F 2d 356 (2nd Cir. 1974). That concerned a suit for malicious prosecution against New York City based upon alleged coercion by one of its police officers in obtaining a confession which led to plaintiff's conviction and incarceration. The conviction was ultimately overturned on appeal. A jury returned verdicts against the City of $40,000.00 in compensatory damages and $80,000.00 in punitive damages. While this court affirmed the compensatory award, it set aside the award for punitive damages.

Writing for the court, Judge Smith pointed out that "while vicarious liability for compensatory damages requires only that the servant was acting within the broad outlines of his employment, penitive damages are assessed against the employer with far greater reluctance.

"The punitive and deterrent underpinnings of a punitive damage award explain this divergence in vicarious liability doctrine. For whereas the purpose of compensatory damages - compensation of the victim - is accomplished whether payment comes from the master or his misbehaving servant, that of punitive damages - to punish the wrongdoer and deter him and others from duplicating his misconduct - is not. Unless the employer is himself guilty of some tortious act (or omission) because his employee has misbehaved, an award punishing the employer and deterring him and others situated to act likewise (i.e., other employers) makes no sense at all." Williams vs. City of New York, supra, 360.

Consistent with the ruling of Williams vs. City of New York, supra, Judge Blumenfeld noted that "the employer himself must be shown to have acted or failed to act to prevent known or willfully disregarded actions of his employee in order to be liable in punitive damages. [citations omitted] Such showings have not been made in this case." (JA p. 53). Thus, there is no basis in the unchallenged facts of this case for imposition of punitive damages upon the defendant for tortious acts committed by his field employees.[6]

In their attempt to bridge the connective gap between defendant and the acts of his two field employees, plaintiffs represent the district court to have

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[6] see: Marr vs. Rife 503 F 2d 735, 744-5 (6th Cir. 1974), a rental discrimination case brought, in part, under 42 USC §3612, which recognized that tie-in "by action or knowledgeable inaction" of employer to discriminatory acts of employee is prerequisite to imposition of punitive damages upon employer.

"ruled that the defendant could not be liable in punitive damages merely for the willful, wanton, careless and/or insensitive actions of his employees." (Plaintiff's Brief p. 17). This is a misstatement of Judge Blumenfeld's Memorandum. The unchallenged factual finding is "that the racially discriminatory practices of Bedard and LaCroix were unique in and undiscovered by [defendant's] company. In such circumstances an award of punitive damages against [defendant] is unjustified." (JA p. 55).[7]

C. An Award of Attorney's Fees Under 42 USC §3612(c) is Discretionary.

Plaintiffs' claim for attorney's fee, grounded on both the case law developed under 42 USC §1982 and the statutory provisions of 42 USC §3612 (c),[8] was denied by the district court. Subsequent to Judge Blumenfeld's

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[7] Even assuming, arguendo, a factual basis for assessing punitive damages against the defendant, the imposition of such damages does not follow as a matter of right. Such damages are not favored in the law and therefore "are to be allowed only with caution and within narrow limits." Lee vs. Southern Home Sites Corp. 429 F 2d 290, 294 (5th Cir. 1970) - a fact of which Judge Blumenfeld was mindful. see: LaReau vs. Manson 383 F. Supp. 214, 219 (1974). Punitive damages are a matter within the trier's discretion and appellate review is accordingly narrow. Hilliard vs. Williams 516 F 2d 1344, 1350 (6th Cir. 1975). In this case, Judge Blumenfeld has explicitly concluded that an award of punitive damages against the defendant is unjustified. His exercise of discretion is supported by the facts. see: Stolberg vs. Members of Board of Trustees 474 F 2d 485, 489 (2nd Cir. 1973).

[8] "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000.00 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fee."

Memorandum, the Supreme Court decided Alyeska Pipeline Service Co. vs. Wilderness Society, supra, which, in substance and effect, foreclosed plaintiffs from their Section 1982, private attorney general argument. Therefore, as they must, plaintiffs here rely solely upon 42 USC §3612(c).

Plaintiffs attempt to circumvent the discretionary language of the statute by arguing for a presumption in favor of attorney's fee awards, akin to that recognized by the Supreme Court in public accomodation cases under Title II of the Civil Rights Act of 1964.[9] Newman vs. Piggie Park Enterprises, Inc. 390 US 400, 401 (1968). Judge Blumenfeld's reasoning in refusing to so extend Newman is set out in his Memorandum (JA pp. 59-61) and requires no elaboration by defendant.

Plaintiffs also attack the balancing-of-equities test employed by the district court. While conceding that under Alyeska they "cannot recover counsel fees for their services as private attorney generals (sic)" (Plaintiff's Brief, p. 11), they, at one and the same time, complain that the district court "did not consider, in determining whether or not to award attorney's fees to successful plaintiffs under Title 42 U.S.C. §3612, whether they had acted as private attorneys general." (Plaintiff's Brief, p. 15)

This approach is premised under plaintiffs' factually unsubstantiated contention that they were instrumental in obtaining "the meaningful consent

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[9] 42 USC §2000a - 3(b)

decree entered in this case." (Plaintiffs' Brief, p. 15)[10]

In effect, plaintiffs are arguing that an equity-balancing test under 42 USC §3612(c) should give presumptive weight favoring an award of attorney's fees where plaintiff can be said to have assumed a private attorney general role. In so arguing, plaintiffs are merely reiterating their contention that the district court erred in failing to extend Newman.

However, plaintiffs ignore the fact that the Newman presumption is limited to cases in which special circumstances do not render an award of attorney's fees unjust. Newman vs. Piggie Park Enterprises, Inc., supra, 402. Here, the district court's acknowledgment of the corrective efforts voluntarily undertaken by defendant, coupled with its finding that defendant was only vicariously liable under the doctrine of respondeat superior, should be sufficient to establish the special circumstance exception to the Newman presumption.

Plaintiffs offered no evidence at trial of their ability or inability to pay attorney's fees.

The district court was correct in concluding that there is no legal or factual basis for awarding attorney's fees to plaintiffs.

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[10] In arguing that the district court did not properly consider what plaintiffs purport was their "integral part in obtaining the consent decree" entered into by defendant at the start of trial, plaintiffs suggest that Judge Blumenfeld was unaware of plaintiffs' connection with it. (Plaintiffs' Brief p. 11) The audaciousness of this contention ignores not only the judge's signature on the decree (JA p. 34), but also his specific memorandum reference to plaintiffs joining in it (JA p. 33).

CONCLUSION

Having specifically disclaimed compensatory damages, plaintiffs cannot now collect compensation for a dignitory tort under the rubric of nominal damages. They now seek compensatory/nominal damages only because the district court saw fit to deny their claim for punitive damages.

The awarding of both punitive damages and attorney's fees is within the discretion of the district court. Plaintiffs' various arguments for limiting this discretion are necessitated by the court's factually-supported conclusions that, first, defendant was neither actively nor passively linked to the discriminatory acts of his employees and, second, the lack of defendant's culpability would make an award of attorney's fees unjust.

Plaintiffs argue that the court's discretion should be limited, so that despite the injustice to the defendant, punitive damages might be imposed and attorney's fees awarded, all to provide a deterring example to would-be malfeasors. If the court were to adopt this argument, there is no question but that plaintiffs would profit from the example to be made of defendant; but the cost to a system which inscribed "Equal Justice Under Law" over the doors of its highest court would be great indeed.

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

* *

LUDDIE FORT, for herself and for all others similarly situated, et al

VS. NO. H-74-189

ROBERT C. WHITE d/b/a
ROBERT C. WHITE CO. REALTORS

* *

A F F I D A V I T

I, Attorney Albert J. Callahan, 60 Washington Street, Hartford, Connecticut hereby certify that I represent the Defendants in the above-captioned action and in particular the Affiliated FM Insurance Company of Johnston, Rhode Island, the errors and omissions insurance company of the Defendant. On Monday, December 16, 1974 I spoke with Attorney Bruce Mayor, 190 Trumbull Street, Hartford, Connecticut, Attorney for the Plaintiff and advised Attorney Mayor that I was on trial in the Court of Common Pleas before Judge Levine and a jury of six. This verdict was returned on December 18, 1974. I advised him that I was unable to be present for trial in the Federal Court on December 17, 1974 at 2:00 PM on the above-mentioned law suit. He advised me that it was unnecessary for me to be present as they were only seeking punative damages. With that representation I withdrew my objection to the trial of the above-mentioned law suit.

ALBERT J. CALLAHAN, ESQ.

STATE OF CONNECTICUT)
) ss. Hartford
COUNTY OF HARTFORD)

Subscribed and sworn to before me this 2nd day of January, 1975.

GERALD F. DEVOKAITIS
Commissioner of the Superior Court

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUDDIE FORT et al
Plaintiffs-Appellants

vs. DOCKET NO. 75-7407

ROBERT C. WHITE d/b/a
ROBERT C. WHITE CO.,
REALTORS
Defendant-Appellee

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Defendant-Appellee's Brief was deposited in the United States mails, first class, postage prepaid, addressed to the following attorneys:

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on this 15th day of October, 1975.

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